GANDA HOLDINGS BHD.

v.

PAMARON HOLDINGS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[ORIGINATING SUMMONS NO. D2-31-156-88]
21 APRIL 1989

CIVIL PROCEDURE: *Application to determine whether defendant entitled in law to present a winding up petition against plaintiff - Whether defendant is vendor or judgment creditor - Whether creditor with judgment order for unliquidated damages is entitled under s. 217(1)(b) of Companies Act to present winding up petition - Whether declaration sought by plaintiff is a delaying tactic.*

COMPANY LAW: *Locus standi of a party to present a winding up petition - Whether status of party presenting winding up petition should be determined by separate application - Whether creditor with judgment order for unliquidated damages is entitled under s. 217(1)(b) of Companies Act to present winding-up petition.*

This application by the plaintiff was for a declaration that the defendant was not a judgment creditor under s. 217(1)(b) of Companies Act 1965 and had no *locus standi* to present a winding up petition against the plaintiff. In a previous suit, the defendant obtained judgment against the plaintiff wherein a contract for the sale and purchase of shares was to be specifically enforced by the plaintiff paying to the defendant the purchase price within a stipulated period, failing which the plaintiff shall pay damages (to be assessed) to the defendant. The plaintiff failed to complete the sale within the stipulated time and a notice was sent to the plaintiff under s. 218(1)(e) Companies Act 1965 demanding payment under the judgment failing which a winding up petition would be presented against the plaintiff. The issue was whether the defendant was a creditor under s. 217(1)(b) Companies Act.

Held: (Dismissing the originating summons)

[1] The order for specific performance of a contracted obligation on the part of the plaintiff is not a judgment for a specific sum of money which entitles the defendant to assume the status of a creditor.

[2] When the plaintiff failed to complete the sale as ordered, it became liable to pay damages to the defendant and the judgment has been converted into a money judgment (although unliquidated) and the defendant becomes clothed with the status of a creditor under s. 217(1)(b) of the Act, being a contingent and prospective creditor of a company and may present a winding up petition.

[3] The proper time to raise the question of *locus standi* or status of a petitioner is in the winding up petition itself and not by way of a separate application, which serves as a delaying tactic.

[4] The plaintiff ought to have applied for a stay of execution against the order for specific performance/damages and the present application cannot be used to achieve the purpose.

Cases referred to:
Re North Bucks Furniture Depositories Ltd., [1939] Ch D 690
In re Combined Weighing And Advertising Machine Company [1889] 43 Ch D 99
In re Pen-Y-Van Colliery Company [1877] 6 Ch D 477

Legislation referred to:
Companies Act 1965, ss. 217(1)(b), 218(1)(e), 219(2), 222 - 224

Other sources referred to:
Halsbury's Law of England, 4th Edn., Vol. 7(2)
The Law of Company Liquidation, 3rd Edn.

JUDGMENT

Siti Norma Yaakob J:

The plaintiff in this suit is a public listed company whose share are traded on the stock exchanges of Malaysia and Singapore.

On 13 February 1988, in civil suit 22-174-86, the defendant had obtained an order from George J which, *inter alia*, provides that a sale and purchase agreement dated 1 February 1986, entered into between the plaintiff and the defendant be specifically enforced by the plaintiff completing the purchase of 1,108,000 shares of RM1 each fully paid in Seasion Corporation Sdn. Bhd. from the defendant and paying the defendant RM845,970.91, being the purchase price of the shares within 14 days of the date of the order.

The plaintiff failed to complete the sale within the time stipulated and on 1 August 1988, the defendant sent a notice to the plaintiff under s. 218(1)(e) of the Companies Act 1965, (the Act), demanding payment of the sum of RM845,970.91 under the judgment within 21 days, failing which the defendant would proceed to present a winding up petition against the plaintiff.

On 16 August 1988, five days before the expiry of the 21 days stated in the notice, and in an effort to prevent the defendant from presenting a winding up petition against it, the plaintiff filed this originating summons seeking *inter alia*, a declaratory relief that under the order of Court dated 13 February 1988, the defendant is not a creditor but is only a vendor and as such has no *locus standi* to present a winding up petition against it.

Before me, Mr. M.S. Murthi, Counsel for the plaintiff, argued that since the threatened petition for winding up is based on the plaintiff's inability to pay its debt, the defendant will be presenting such a petition in its capacity as a creditor, under s. 217(1)(b) of the Act, and since the Act contains no definition of the term "creditor", the only issue raised in this originating summons is who in law can be treated as a creditor, and whether by the order of Court dated 13 February 1988, the defendant can be regarded as one to entitle it to present a winding up petition against the plaintiff.

Text book writers have approached the subject in many ways.

Halsbury Law of England, 4th Edn., Vol. 7(2) lists the following persons as creditors.

1. The assignee of a debt, if the assignment is not made while the creditor's petition is pending.
2. The equitable assignee of part of a debt.
3. The executor of a creditor, even before probate.
4. A creditor in respect of a debt incurred by voluntary liquidation.
5. A secured creditor.
6. A judgment creditor.
7. The holder of a debenture bond of an insolvent company which has not yet matured for payment.

8. Generally any creditor whose debt is not genuinely disputed by the company on substantial grounds.

McPherson J in his book "*The Law of Company Liquidation*", 3rd Edn. at p. 45 sums up the situation in the following manner.

> It is obviously not easy to formulate a test, at once both simple and comprehensive, for determining who is entitled to apply for a winding up in the capacity of creditor. The applicant must be one who has a claim to be paid a sum of money by the company, but that sum need not be liquidated and it need not be presently payable. Nor is it essential that it should be recoverable by action for in *Re North Bucks Furniture Depositories Ltd.*, [1939] Ch D 690, a local authority to which the company was indebted for unpaid rates, was held entitled to present a petition, although payment of its rates could be enforced only by distress and not by action. Conversely, the mere fact that there is some means of enforcing payment by the company is not itself sufficient to transfer the sum payable into a debt. A garnishee order does not as between the company and the garnishor, create a relationship of debtor and creditor as to confer as a right to have the company wound up. See the case of *In re Combined Weighing And Advertising Machine Company* [1989] 43 Ch D 99.

It would appear that the facts of each case have to be closely examined to appreciate whether the relationship of a creditor and a debtor exists.

In this originating summons, the defendant claims that by virtue of the order of Court dated 13 February 1988, it is a judgment creditor and under s. 217(1)(b) of the Act, it has the capacity to present a winding up petition against the plaintiff. To determine whether there is any merit to this contention, I shall now examine the order that was obtained on 13 February 1988 and for this purpose, I shall break it up into a 4 limbs.

1. Specific performance of the agreement dated 1 February 1986 which requires the plaintiff to purchase 1,108,000 shares in Seasion Corporation from the defendant by tendering RM845,590.91 being the purchase price to the defendant within 14 days of the order. In other words, the plaintiff had to pay up by 27 February 1988, the latest.
2. On receipt of such payment, the defendant had 7 days within which to deliver the relevant share certificates together with the memorandum of transfer duly executed to the plaintiff or its nominee.
3. If for any reason, the specific performance ordered cannot be performed, the parties are at liberty to apply.
4. If the plaintiff failed to perform by 28 February 1988, the plaintiff shall pay damages to the defendant, such damages to be assessed by the Senior Assistant Registrar.

From the order it is clear that the first limb speaks of the performance of a contractual obligation on the part of the plaintiff and is not therefore a judgment for a specific sum of money which entitles the defendant to assume the status of a creditor. However, in the performance of its contractual obligation, the plaintiff is to tender a specific sum of money, to the defendant within a specified period of time. Payment of this sum of money is not to be taken in isolation as to give rise to the conclusion that it is a judgment debt as the tender should be read and understood as the consequence of the order for specific performance, which is not a money judgment, *per se*.

However when the tender was not made by the plaintiff on 28 February 1988, the fourth limb of the order comes into operation in that the defendant is now entitled to be paid damages by the plaintiff for such default, such damages to be assessed by the Senior Assistant Registrar. By reason of this, the judgment has been converted into a money judgment and

a although the amount of damages has not yet been assessed, the fact that the defendant is now entitled to damages has changed the status of the defendant to that of a creditor and under s. 217(1)(b) of the Act, a contigent and prospective creditor of a company may petition to Court for a winding up order. By this statutory sanction, the decision in the case of *In Re Pen-Y-Van Colliery Company* [1877] 6 Ch D 477 which is relied upon by the plaintiff, is no longer good law. In that case it was held that a claim for unliquidated damages for fraudulent b representation does not make a man a creditor entitling him to present a petition for a winding up. He must change the claim for damages into a judgment and thus make himself a creditor before he can petition the Court.

A point was raised by the defendant in that this originating summons is misconceived and in form it is nothing more than a delaying tactic, as the issue as to whether the defendant is a creditor can be raised at the proper time in the winding up petition itself. To this the c plaintiff replied that by that time untold damage would have already been done to the plaintiff as being a public listed company, the presentation of the petition itself has the effect of suspending all dealings over the plaintiff's shares and that all its transactions will be void under s. 219(2) read with ss. 222 - 224 of the Act.

Much as I appreciate the plaintiff's dilemma in this matter, the fact remains that the threatened d presentation of a winding up petition by the defendant against it is solely due to the plaintiff's own default in failing to complete the sale within the time stipulated as ordered by the Court.

In its affidavit, the plaintiff has mentioned that it has appealed to the Supreme Court against the order given by George J but if indeed the plaintiff feels strongly about any form of execution that may be levied against it by the defendant, the only cause open to the plaintiff is to apply to have execution on the order of Court stayed. There is no indication that such e a cause of action has been taken and the plaintiff cannot now by the devious method of filing this originating summons hope to obtain the very order which it had failed to get to prevent the defendant proceeding to execute the order of Court dated 13 February 1988.

In any event, on the facts of this case, by reason of the plaintiff's default in failing to specifically perform the sale and purchase agreement dated 1 February 1986, and by the very f nature of the consequential order granted by George J on 13 February 1988, it is my considered opinion that the defendant is a prospective creditor of the plaintiff and under s. 217(1)(b) of the Act, it is entitled to present a winding up petition against the plaintiff based on the order of Court dated 13 February 1988.

On that finding, I dismiss this originating summons with costs to be paid by the plaintiff to the defendant.

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Also found at [1989] 2 CLJ 1014

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